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Supreme Court, U.S.

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1991

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HERZFELD & RUBIN, P.C.,

*Petitioner,*

v.

HARRY ROBINSON, KAY ROBINSON, EVA MAY MCCARTHY,  
GEORGE SAMUEL ROBINSON, and GREER & GREER,  
*Respondents.*

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PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE TENTH CIRCUIT

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October 1991

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### QUESTION PRESENTED

Are private attorneys, in contrast to government lawyers, subject to civil damage actions in which defeated adversaries may relitigate finally adjudicated matters, based on allegations that the attorneys' actions and statements in court as advocates for their clients constituted misconduct causing the loss of prior federal lawsuits; or, does absolute common law immunity from civil damage liability apply to "all persons—governmental or otherwise—who were integral parts of the judicial process." *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983).

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\* The caption lists all parties with the exception of Volkswagen Aktiengesellschaft, a corporation organized under the laws of the Federal Republic of Germany with its place of business in that nation.

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Herzfeld & Rubin, P.C. respectfully petitions for a writ of certiorari to review the Order of the Court of Appeals for the Tenth Circuit.

**OPINIONS BELOW**

The decision of the United States Court of Appeals for the Tenth Circuit (1a-12a, *infra*) is reported at 940 F.2d 1369. The decision of the United States District Court for the Northern District of Oklahoma (13a-16a) is unreported.

## JURISDICTION

The Order of the United States Court of Appeals for the Tenth Circuit was entered on August 1, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

## STATEMENT

The plaintiffs in this action, in nearly a decade of litigation, lost on the merits at trial and on two appeals in the federal courts. In the present action, they nevertheless seek to relitigate their claims in the guise of a “fraud” action against the attorneys for the prevailing parties. Plaintiffs’ substantive claims are based on the attorneys’ acts and statements as advocates in the prior judicial proceedings. This petition challenges the lower courts’ refusal to apply absolute immunity as a bar to such claims and dismiss the action in favor of the other corrective recourse available in the judicial system for such alleged misconduct.

In deciding immunity questions, this Court has looked to the common law doctrine of absolute immunity. Such immunity encompassed “all persons—*governmental or otherwise*—who were integral parts of the judicial process.” *Briscoe v. LaHue*, 460 U.S. 325, 335 (1983) (emphasis added). As this case demonstrates, without such protection, it is “inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict.” *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). The resulting burden on the judicial process would cast a pall over all participants in litigation.

Based on this Court's leading decisions, other courts of appeal have recognized that the protections of immunity are essential to ensure the proper performance of their duties by both private and government advocates in civil litigation. (Point I, *infra*) In the decision below, however, the Tenth Circuit denied immunity to privately retained defense attorneys sued for alleged "fraud" based on the attorneys' successful arguments concerning the introduction of certain evidence. The circuit court acknowledged that absolute immunity has been extended to attorneys defending civil litigation brought against state and federal governments with respect to conduct indistinguishable from that in suit. However, the court purported to discern a distinction at common law between government and private attorneys, under which private attorneys' immunity barred only claims sounding in defamation. The rule adopted below would thus permit an attorney's ostensible immunity from intimidation and harassment by unsuccessful adversaries to be sidestepped merely by artful pleading in subsequent litigation.

The decision below conflicts, not only with other circuits, but with virtually every rationale espoused by this Court in support of immunity. (Point II, *infra*) Most basically, "freeing the judicial process from harassment or intimidation has been thought to require absolute immunity even for *advocates* and witnesses." *Forrester v. White*, 484 U.S. 219, 226 (1988) (emphasis added). The key principle of finality of judgments is likewise implicated, as "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum

will frequently seek another.” *Butz v. Economou*, 438 U.S. 478, 512 (1978).

Because the object of protection is the process rather than its participants, “immunity analysis rests on functional categories, not on the status of the defendant.” *Briscoe v. LaHue*, 460 U.S. at 342 (Point III, *infra*). Despite lip service to the functional analysis mandated by this Court, however, the court below denied immunity based solely on the non-governmental “status of the defendant” attorneys. *Id.*

This result carries a particular potential for mischief because its rationale, though at odds with this Court’s relevant doctrines, purports to be based on the very line of cases with which it in fact conflicts. Such a fundamental misreading of this Court’s teachings should be addressed as soon as it appears. Review by this Court is needed to clarify the application of the governing doctrines to privately retained counsel and to resolve the inter-circuit conflicts in this area.

### **Background**

This litigation arises from a highway collision and fire in 1977, in which plaintiffs’ Audi sedan was struck from the rear by a pickup truck travelling over ninety miles an hour. Claiming that defective design of their vehicle’s fuel tank had caused its rupture on impact, plaintiffs commenced suit for personal injuries in the Oklahoma state courts. The named defendants were the vehicle’s importer Volkswagen of America, Inc. (“VWOA”), its designer and manufacturer Audi NSU Auto Union Aktiengesellschaft, now Audi AG (“Audi”), its wholesale distributor and the retail

dealer. See *Robinson v. Audi NSU Auto Union*, 739 F.2d 1481, 1482-1483 (10th Cir. 1984).<sup>1</sup>

Immediately after the dealer and wholesale distributor were dismissed by this Court in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the remaining defendants, VWoA and Audi, removed the action to the United States District Court for the Northern District of Oklahoma based upon diversity of citizenship.

At trial in late 1981, the jury found for the defendants. Over the next five years, this outcome was reviewed and affirmed twice, and rehearing was sought and denied on each appeal. *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986); *Robinson v. Audi NSU Auto Union*, 739 F.2d 1481.

At all relevant times, petitioner Herzfeld & Rubin, P.C. ("H&R") was defendants' supervising trial counsel. As such, H&R actively participated in all phases of the case, including discovery and trial.

#### **The Present Litigation**

On October 5, 1987, approximately one year after the Tenth Circuit denied rehearing of their second appeal on the merits, plaintiffs commenced the present diversity action. Naming new defendants, plaintiffs sought the precise damages which they had failed to obtain against the original defendants. With respect to H&R, plaintiffs asserted a cause of action

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<sup>1</sup> VWoA's German parent Volkswagenwerk Aktiengesellschaft ("VWAG"), though originally named as a defendant, was voluntarily dismissed by plaintiffs early in the litigation in favor of Audi, the actual designer and manufacturer of the subject vehicle.

in common law fraud, based upon answers to interrogatories and statements at trial arguing the admissibility of evidence. According to plaintiffs, these discovery and trial statements by H&R fraudulently concealed the "true relationship" between VWAG and Audi from plaintiffs, thereby precluding them from using certain liability evidence during the trial. (3a)<sup>2</sup>

The case was filed in the District of Arizona, which transferred the case to the Northern District of Oklahoma as an attack on the judgment on the merits. Following transfer, H&R moved to dismiss the complaint, or in the alternative for summary judgment. In support of those motions, H&R claimed, *inter alia*, that it was absolutely immune from civil damage liability to an adversary based upon its discovery and courtroom conduct in the previous trial.<sup>3</sup>

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<sup>2</sup> In addition to the claims against H&R at issue on this petition, plaintiffs sought to retry their lost personal injury action, asserting claims for negligence, strict products liability and breach of warranty, notwithstanding the twice-affirmed adverse verdict on the merits. Plaintiffs also sued VWAG for fraud in connection with answers to interrogatories and representations at trial and asserted a malpractice claim against their former trial counsel, Greer & Greer, who cross-claimed against H&R and VWAG. (3a) These claims are not before this Court, except to the extent that H&R's claim of immunity also applies to the cross-claim of plaintiff's former trial counsel.

<sup>3</sup> Since the transfer to the Northern District of Oklahoma, plaintiffs have filed two additional actions. In the Northern District of Oklahoma, plaintiffs have brought a plenary action against the original defendants Audi and VWoA seeking to set aside the previous judgments for fraud on the court under Rule 60(b), F.R.Civ.P. They have also commenced an additional fraud and product liability action against VWoA and Audi now pending in the District of Arizona. No aspect of these actions is at issue on the present petition.

### Rulings Below

The district court denied H&R's claim of absolute immunity, holding without discussion that "any immunity that might attach to a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent" (3a).<sup>4</sup> H&R appealed, and the court of appeals affirmed in the decision challenged on the present petition.

The court below summarized its rationale as follows:

In resolving absolute immunity claims, the Supreme Court has taken a functional approach after considering the history of common law immunity. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-35, 345 (1983) (absolute immunity for witnesses). Relevant factors include the recognition of immunity at common law, the risk of vexatious litigation given the function involved, and the availability of checks other than civil litigation if absolute immunity was recognized. [footnote] *Burns v. Reed*, 111 S. Ct. [1934,] 1941-44 [(1991)]; *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). In this case, however, the absolute immunity precedent indicates that H&R's claim of absolute immunity would not be recognized at common law; we need proceed no further. (4a)

\* \* \*

... only in a narrow class of cases involving def-

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<sup>4</sup> The district court dismissed plaintiffs' products liability claims, ruling that those claims could not be relitigated given the prior adverse judgment. The court, however, held that the complaint stated a state common law fraud claim, thus bringing H&R's assertion of immunity from such a claim to the fore.

amation claims has the Supreme Court acknowledged a common law tradition of absolute immunity for private lawyers.(5a)

\* \* \*

While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims, [extensive footnote] the cases do not support an analogous common law tradition for private lawyers. (8a-9a)

Accordingly, the court denied H&R the immunity which it conceded would be enjoyed by government attorneys in federal court with respect to the claims in suit.<sup>5</sup>

#### REASONS FOR GRANTING THE WRIT

##### **I. The Decision Below Directly Conflicts With A Leading Decision Of The First Circuit, And Is Seriously At Variance With The Approach To Immunity Taken By Other Circuits.**

The analytical linchpin of the decision below is the circuit court's finding that "the absolute immunity precedent indicates that H&R's claim of absolute immunity would not be recognized at common law." (4a)

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<sup>5</sup> There has been no dispute that the governing immunity doctrines are matters of federal law. See *Ferri v. Ackerman*, 444 U.S. 193, 197-98 n.10 (1979), quoting *Ferri v. Ackerman*, 394 A.2d 553-55 (Pa. 1978) ("Since we are here concerned with an asserted immunity protecting a participant in a federal legal proceeding, we are required to look to the federal law to determine whether it exists and if it does, its nature and scope."). See generally *Westfall v. Erwin*, 484 U.S. 292 (1988); *Howard v. Lyons*, 360 U.S. 593 (1959).

On this key point, the court below is directly in conflict with the First Circuit and substantially at odds with other circuits which have addressed the immunity issue in civil litigation.

The First Circuit has delineated unequivocal common law support for the comprehensive immunity covering private attorneys which the Tenth Circuit found not to exist. In *Blanchette v. Cataldo*, 734 F.2d 869 (1st Cir. 1984), the First Circuit upheld absolute immunity from all civil damages liability to an adversary for any statements made in connection with the conduct of litigation, regardless of the cause of action asserted. The First Circuit drew no distinction between government or private attorneys in regard to the scope of the immunity, and specifically rejected the notion that private attorneys were immune only to defamation actions:

Under Massachusetts law, an attorney's statements are absolutely privileged "where such statements are made by an attorney engaged in his function as an attorney whether in the institution or conduct of litigation or in conferences and other communications preliminary to litigation." *Sriberg v. Raymond*, 370 Mass. 105, 109, 345 N.E.2d 882, 884 (1976). . . . Thus, the Massachusetts courts have applied the privilege, not only in defamation cases, but as a general bar to civil liability based on the attorney's statements. *Sullivan v. Birmingham*, [11 Mass. App. 359,] 416 N.E.2d [528,] 533 [(1976)].

734 F.2d at 877. The conflict with the finding in the decision below that "H&R's claim of immunity would not be recognized at common law" (4a) could hardly be more clear.

Moreover, the First Circuit in *Blanchette* traced the relevant common law immunity authority directly to the leading early American case on the common law of judicial immunity for counsel, *Hoar v. Wood*, 44 Mass. (3 Metc.) 193 (1841) (Shaw, C.J.), a decision to which this Court has also turned for guidance. See, e.g. *Burns v. Reed*, *supra*; *Briscoe v. LaHue*, *supra*. The Tenth Circuit below read *Hoar v. Wood* narrowly as support only for a defamation immunity. (6a-7a n.4) In fact, the common law authority stemming directly from *Hoar v. Wood* has emphatically rejected that limitation:

The public policy of permitting attorneys complete freedom of expression and candor in communications in their efforts to secure justice for their clients commends itself to us. The basic elements of such a policy were recognized early in this Commonwealth by Chief Justice Shaw in the following terms: “[I]t is, on the whole, for the public interest, and best calculated to subserve the purposes of justice, to allow counsel full freedom of speech, in conducting the causes, and advocating and sustaining the rights, of their constituents; and this freedom of discussion ought not to be impaired by numerous and refined distinctions.” *Hoar v. Wood*, 3 Metc. 193, 197-198 (1841).

*Sriberg v. Raymond*, 345 N.E.2d at 884, quoted in *Blanchette*, 734 F.2d at 877. Other states facing the issue have similarly refused to countenance “numerous and refined distinctions” limiting common law immunity for litigation conduct only to defamation

claims.<sup>6</sup> The conflict with the decision below is profound in nature and comprehensive in scope.

The decision below frankly acknowledged that other circuits have applied this Court's leading decisions in support of absolute immunity to attorneys defending civil litigation against the federal and state governments. (8a-9a n.5) The circuit court below sought to distinguish these cases based on the governmental status of the attorney defendants in those cases. The rationales espoused by other circuits, however, make it clear that the immunity accorded government lawyers is merely a part of the broader protection which must encompass all advocates in civil litigation.

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<sup>6</sup> *E.g. Block v. Sacramento Clinical Labs, Inc.*, 131 Cal.App.3d 386, 182 Cal.Rptr. 438, 440-41 (1982) and numerous cases cited (immunity bars all tort actions, "however labeled and whatever the theory of liability," seeking to recover for false statements in judicial or other protected proceedings); *Thornton v. Rhoden*, 245 Cal.App.2d 80, 99, 53 Cal Rptr. 706, 719 (1966) ("If it is desirable to create an absolute privilege in defamation . . . because we do not want the honest [attorney] to have to be concerned with libel or slander actions while acting for his client, we should not remove one concern and saddle him with another for doing precisely the same thing."); *Rainier's Dairies v. Raritan Valley Farms, Inc.*, 19 N.J. 552, 554, 117 A.2d 889, 895 (1955) ("If the policy . . . is really to mean anything then we must not permit its circumvention by affording an almost equally unrestricted action under a different label.") *Accord, Sullivan v. Birmingham*, 416 N.E.2d at 533-34 (cited with approval in *Blanchette v. Cataldo, supra*) ("[The policy underlying immunity] would be severely undercut if the absolute privilege were to be regarded as less than a bar to all actions arising out of the 'conduct of parties and/or witnesses in connection with a judicial proceeding.'")

For example, the Seventh Circuit has stated the rationale for absolute immunity in terms which do not suggest an exception for private counsel:

... the primary reason for granting attorneys absolute immunity is that their unique function as advocates requires that they be able to present their client's case at trial without intimidation or harassment.

*Auriemma v. Montgomery*, 860 F.2d 273, 278 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1988). It cannot seriously be contended that private citizens are less entitled to counsel "able to present their client's case at trial without intimidation or harassment" than the government.

In a similar vein, the Second Circuit, in *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), found that the absolute immunity afforded prosecutors for conduct during litigation was necessarily available to government attorneys *defending* civil suits. Making immunity depend on whether the lawyer acts in the capacity of counsel for "plaintiff" or "defendant" elevated form over substance. 798 F.2d at 572. The Second Circuit further observed that "[e]xtension of absolute immunity to defending government litigators finds common law and historical support in the broader principle that 'the immunity which is extended to the judges is in like manner extended to the attorneys in the presentation of a client's case to the court or the jury.'" *Id.* (citing *Yaselli v. Goff*, 12 F.2d 396, 402 (2d Cir. 1926), *aff'd*, 275 U.S. 503 (1927)). There is no hint that the "broader principle" articulated in *Barrett* excludes any category of attorney based on the identity of the attorney's client.

Likewise, the Eighth Circuit in *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988), found in this Court's decisions "a firm common law and historical basis for the extension of immunity to trial counsel." 849 F.2d at 1105. Though considering the case of a government attorney defending a civil rights claim, the Eighth Circuit, like the Seventh and Second Circuits, articulated the broader immunity doctrine upon which the present petition rests, and concerning which the court below erred.

The conflicting authority in regard to the scope of immunity as applied to private attorneys acting as advocates within the federal court system fully warrants this Court's attention. The head-on conflict between the First and Tenth Circuits is certain to generate substantial litigation burdens in a number of future cases, with conduct that would be absolutely immune within one circuit exposing the actor to suit in another. The lack of a uniform standard can only be definitively addressed by this Court.

**II. In Holding That There Is No Common Law Support For The Immunity Claimed, The Decision Below Fundamentally Misreads This Court's Relevant Line Of Authority.**

The finding below that the common law would not recognize the immunity claimed on behalf of private defense counsel conflicts, not merely with other circuits, but with this Court's clear pronouncements. First, this Court itself has left no doubt that there is "a historical or common law basis for the immunity" being claimed:

The common law's protection for judges and prosecutors formed part of a "cluster of immunities

protecting the various participants in judge-supervised trials,” which stemmed “from the characteristics of the judicial process.” *Butz v Economou*, [*supra*], 438 U.S. [at] 512 . . . ; cf. *King v Skinner*, Lofft 54, 56, 98 Eng. Rep. 529 (K.B. 1772) (“[N]either party, witness, counsel, jury, or judge can be put to answer, civilly or criminally, for words spoken in office”). The common law recognized that

“controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another. . . . Absolute immunity is thus necessary to assure that judges, *advocates*, and witnesses can perform their respective functions without harassment or intimidation.” *Butz, supra*, at 512.

In short, the common law provided absolute immunity from subsequent damages liability for all persons—*governmental or otherwise*—who were integral parts of the judicial process.

*Briscoe v. LaHue*, 460 U.S. at 335 (emphasis added).

Nevertheless, the court below professed itself unable to perceive a common law basis for the claimed immunity. In support of this conclusion, the circuit court relied upon *Tower v. Glover*, 467 U.S. 914 (1984) and *Burns v. Reed, supra*. This reliance was gravely misplaced.

*Tower v. Glover* is patently inapplicable, as it involved a controversy between counsel and client. *Id.*, 467 U.S. at 916. Attorneys, of course, have no immunity from malpractice claims by their own clients. For that very reason, prior to *Tower v. Glover*, this

Court had already noted the distinction between lawyer-client litigation, in the immunity context, and "other kinds of tort suits . . . brought by someone other than [an attorney's] client." *Ferri v. Ackerman*, 444 U.S. at 204 n.22.

The circuit court's reliance on *Burns v. Reed*, *supra*, is, frankly, puzzling. Far from abrogating the claimed immunity, *Burns v. Reed* virtually echoes *Briscoe v. LaHue*, *supra*, in expounding the common law's grant of absolute immunity to counsel with respect to any civil claims arising from allegedly false statements in judicial proceedings, whether defamatory or not:

Like witnesses, *prosecutors and other lawyers were absolutely immune from damages liability at common law for false or defamatory statements in judicial proceedings* (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses.

111 S.Ct. at 1941 (emphasis added).

The court below misread *Burns* in two respects. First, it ignored this Court's direct statement that immunity applied to "false *or* defamatory" statements by counsel. Second, it read *Burns* as applying only to defamation cases merely because the cited cases all happened to involve defamation claims. These errors led to the circuit court's startling conclusion that this Court has restricted counsel's immunity to "a narrow class of cases involving defamation claims." (5a) In fact, it appears that this Court has never decided any immunity case involving private counsel's immunity to defamation claims.

This court's relevant immunity decisions, fairly read, provide no support whatever for the circuit court's finding that the immunity at issue was unknown to the common law.<sup>7</sup> To the contrary, they squarely establish the first leg of this Court's three part test for immunity, "a firm common law and historical basis for the extension of immunity to trial counsel." *Murphy v. Morris*, 849 F.2d at 1105. *Mitchell v. Forsyth*, 472 U.S. at 521.<sup>8</sup>

<sup>7</sup> The circuit court further sought to analogize the claims in this case to a suit for malicious prosecution, from which private attorneys, unlike prosecutors, are not immune. (7a) This approach, which we have not found employed by any other court, is totally inapposite. To take the circuit court's own example, a private attorney abetting a client's instigation of proceedings by a third party is by definition not functioning as an advocate in a judicial proceeding and thus lacks any colorable claim to immunity. In similar circumstances, prosecutors have been denied immunity for legal advice to the police before judicial proceedings are instigated. *Burns v. Reed*, 111 S.Ct. at 1944-45. Even judges have no immunity for their non-judicial or administrative conduct. *Forrester v. White*, 484 U.S. at 230; cf. *Mireles v. Waco*, No. 91-311, 60 U.S.L.W. 3161 (October 21, 1991). More fundamentally, a malicious prosecution action, which can be brought only by *prevailing defendants*, is the antithesis of an attempt by *defeated plaintiffs* to relitigate losing claims. See Restatement (2d) Torts §§ 653 (criminal), 674(b) (civil).

<sup>8</sup> The three elements are set forth in *Mitchell v. Forsyth*, in the following terms:

- whether there is "a historical or common law basis for the immunity" (*Id.* at 521);
- whether performance of the function as to which immunity is claimed creates "obvious risks of vexatious litigation" (*ibid*); and
- whether those claiming immunity "are subject to other checks that help to prevent abuses . . . from going unredeemed" (*Id.* at 522)

As to the second element of immunity analysis, no imagination is needed to appreciate that performance of the function of trial counsel creates "obvious risks of vexatious litigation." *Id.* at 521. Indeed, this case itself exemplifies the point. When fought to a finish, high stakes lawsuits will invariably disappoint one side, often bitterly so. As this Court noted, it is

inevitable that many of those who lose will pin the blame on judges, prosecutors, or witnesses and will bring suit against them in an effort to relitigate the underlying conflict. . . . [T]he mere threat of litigation may significantly affect the fearless and independent performance by actors in the judicial process.

*Id.* at 521-522. See also, e.g., *Barrett v. United States*, 798 F.2d at 572.

The final relevant factor in extending immunity, whether there are "other checks that help to prevent abuses . . . from going unredressed," is also addressed definitively in *Mitchell v. Forsyth* itself:

[T]he judicial process is largely self-correcting: procedural rules, appeals, and the possibility of collateral challenges obviate the need for damages actions to prevent unjust results.

472 U.S. at 522-23.

Prominent among those safeguards is Rule 60(b), Fed. R. Civ. P., under which judgments tainted by fraud on the court may be vacated at any time in the interest of justice. Remedies against advocates include disciplinary proceedings, contempt, and the

provisions of Rule 11 and 28 U.S.C. § 1927. See *Mitchell v. Forsyth*, 472 U.S. at 522-23; *Imbler v. Pachtman*, 424 U.S. 409, 429 (1976); *Murphy v. Morris*, 849 F.2d at 1105; *Barrett v. United States*, 798 F.2d at 573; *Blanchette v. Cataldo*, *supra*. These codified sanctions are reinforced by the inherent powers of the courts to deal with misfeasance by attorneys, including violations of established ethical norms. *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2134 (1991); *In re Snyder*, 472 U.S. 634, 645 (1985). The immunity doctrine merely excludes from this arsenal damage suits by those who wish that the final outcome of previous litigation had been different.

Private attorneys in federal civil litigation satisfy all elements of the test laid down by this Court in *Mitchell v. Forsyth*, *supra*. The decision of the Tenth Circuit denying immunity solely on the basis of an advocate's private status is plainly incorrect.

### **III. The Holding Below That Government Attorneys Are In Effect More "Integral Participants In The Judicial Process" Than Private Attorneys Runs Precisely Counter to the Policies Behind the Immunity Doctrine.**

The status-based distinction drawn by the Tenth Circuit between government and private advocates is not easily squared with this Court's relevant decisions:

... immunity analysis rests on functional categories, not on the status of the defendant.

*Briscoe v. LaHue*, 460 U.S. 325 at 342; see also *Imbler v. Pachtman*, 424 U.S. 409. This conclusion is com-

pelled by the policy considerations behind immunity, which apply with equal force to privately retained attorneys:

... [F]reeing the judicial process of harassment or intimidation—has been thought to require absolute immunity even for advocates and witnesses.

*Forrester v. White*, 484 U.S. at 226 (citing *Briscoe*, *supra*; *Butz v. Economou*, 438 U.S. at 512). Private attorneys representing their clients, are no less “integral parts of the judicial process,” *Briscoe v. LaHue*, *supra*, and no less entitled to freedom from harassment or intimidation than attorneys defending the government in civil litigation. Indeed, the threat of civil liability will often more effectively chill the zealous efforts a private attorney should make as an advocate on behalf of a client than would be the case with a government employee. See *United States v. Hurt*, 543 F.2d 162, 165-68 (D.C. Cir. 1976).

No extended discussion is needed. The decision below plainly runs counter to the overriding public policy considerations upon which absolute privilege rests. Left unreviewed, the erroneous doctrines espoused below will inhibit “[t]he first essential element of effective assistance of counsel”, which is “counsel able and willing to advocate fearlessly and effectively,” *id.* at 167-68—with no countervailing public benefit.

CONCLUSION

The petition should be granted.

Respectfully submitted.

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October, 1991

## APPENDIX



UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

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No. 90-5082

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HARRY ROBINSON and KAY ROBINSON, EVA MAY  
McCARTHY  
and GEORGE SAMUEL ROBINSON  
Plaintiffs-Appellees,

vs.

VOLKSWAGENWERK AG,  
Defendant,

GREER & GREER,  
Defendant-Appellee,  
and HERZFELD & RUBIN, P.C.,  
Defendant-Appellant.

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FILED August 1, 1991

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APPEAL FROM THE UNITED STATES DISTRICT  
COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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Herbert Rubin (and Daniel V. Gsovski, Herzfeld & Rubin, New York, New York, Richard M. Eldridge & John F. Tucker, Rhodes, Hieronymous, Jones, Tucker & Gable, Tulsa, Oklahoma, with him on the brief) for Defendant-Appellant. Thomas Elke, Palo Alto, California (Ronald D. Mercaldo & Lucille D. Sherman, Law Offices of Ronald D. Mercaldo, Ltd., Tucson, Arizona, Winton D. Woods, Tucson, Arizona, Maynard I. Ungerman, Ungerman & Iola,

Tulsa, Oklahoma, with him on the brief) for Plaintiffs-Appellees.

Jack Redhair (and Nancy Coomer, Chandler, Tullar, Udall & Redhair, Tucson, Arizona, with him on the brief) for Defendant-Appellee.

Before TACHA and BALDOCK, Circuit Judges, and KANE, District Judge.<sup>1</sup>

BALDOCK, Circuit Judge.

Defendant-appellant Herzfeld & Rubin, P.C. (H & R) appeals from an interlocutory order of the district court denying a motion to dismiss and a motion for summary judgment filed by itself and defendant Volkswagenwerk AG (VWAG). See V R. doc. 199 (Amended Order filed Apr. 25, 1990). Normally, our jurisdiction under 28 U.S.C. § 1291 extends only to final orders. Appellant H & R correctly maintains that we have jurisdiction based on the collateral order doctrine as applied to a denial of absolute immunity. See *Nixon v. Fitzgerald*, 457 U.S. 731, 742-43 (1982); *Helstoski v. Meanor*, 442 U.S. 500, 506-08 (1979); *Abney v. United States*, 431 U.S. 651, 657-63 (1977); *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546-547 (1949). Appellant also urges us to exercise pendent appellate jurisdiction over several interlocutory rulings of the district court pertaining to the merits of the controversy. See *Snell v. Tunnell*, 920 F.2d 673, 676 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1622 (1991).

This case has a protracted history which we need not detail other than to say that the plaintiffs have been unsuccessful in obtaining relief for injuries suffered in a tragic automobile accident. See *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *Robinson v. Volkswagen of America, Inc.*, 803 F.2d 572 (10th Cir. 1986); *Robinson v.*

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<sup>1</sup> The Honorable John L. Kane, Jr., Senior United States District Judge, sitting by designation.

*Audi NSU Auto Union Aktiengesellschaft*, 739 F.2d 1481 (10th Cir. 1984). In its present incarnation, plaintiffs include claims for negligence, strict products liability, and breach of warranty. See I R. doc. 142 at 1/2 1/297-100 (count I). The district court has ruled that these claims will not be relitigated given the previous adverse final judgment. See I R. doc. 64 at 3; V R. doc. 199 at 3. Also included is a malpractice claim against plaintiffs' previous trial counsel, defendant Greer & Greer (G & G). I R. doc. 142 at 1/2 1/2103-07 (count III). Plaintiffs also claim that defendant VWAG is liable for fraud in connection with H & R's answers to interrogatories and representations at trial. I R. doc. 142 at 1/2 1/2108-09 (count IV). In this same regard, plaintiffs also claim that H & R is independently liable for fraud in its litigation conduct. *Id.* at 1/2 1/2101-02 (count II), 108-09 (count IV). According to plaintiffs, H & R fraudulently concealed the true relationship among VWAG and Audi NSU and Auto Union from the plaintiffs, thereby precluding the plaintiffs from using critical liability evidence against VWAG and collecting damages. G & G has crossclaimed against defendants H & R and VWAG based on the same theories.

H & R claims that it is absolutely immune from civil liability for damages based upon its discovery and courtroom conduct in the previous trial. The district court rejected this theory, stating that "any immunity that might attach to a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent." V R. doc. 199 at 4. Our review of the district court's legal determination on absolute immunity is *de novo*. See *Snell*, 920 F.2d at 694. Given the sparing recognition of absolute immunity by both the Supreme Court and this court, one claiming such immunity must demonstrate clear entitlement. See *Burns v. Reed*, 111 S. Ct. 1934, 1944-45 (1991); *Forrester v. White*, 484 U.S. 219, 230 (1988); *Snell*, 920 F.2d at 692-93; *Rex v. Teeple*s, 753 F.2d 840, 843-44 (10th

Cir.), *cert. denied*, 474 U.S. 967 (1985); *Lerwill v. Joslin*, 712 F.2d 435, 440 (10th Cir. 1983).

In resolving absolute immunity claims, the Supreme Court has taken a functional approach after considering the history of common law immunity. *See, e.g., Briscoe v. LaHue*, 460 U.S. 325, 334-35, 345 (1983) (absolute immunity for witnesses). Relevant factors include the recognition of immunity at common law, the risk of vexatious litigation given the function involved, and the availability of checks other than civil litigation if absolute immunity was recognized.<sup>2</sup> *Burns*, 111 S. Ct. at 1941-44; *Mitchell v. Forsyth*, 472 U.S. 511, 521-22 (1985). In this case, however, the absolute immunity precedent indicates that H & R's claim of absolute immunity would not be recognized at common law; we need proceed no further. *See Tower v. Glover*, 467 U.S. 914, 922-23 (1984); *Burns*, 111 S. Ct. at 1945 (Scalia, J., concurring in judgment in part and dissenting in part) (common law tradition of immunity is a necessary, but not sufficient, condition for absolute immunity in 1983 actions).

Concerning suits by litigants other than an attorney's own client, the general rule is that:

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<sup>2</sup> Employing this approach, the Supreme Court has held that a judge is absolutely immune from civil damages, unless he or she acts without a colorable claim of jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978); *Pierson v. Ray*, 386 U.S. 547, 553-55 (1967). Acting in an administrative capacity, however, a judge does not enjoy the protection of absolute immunity. *Forrester*, 484 U.S. at 230. Likewise, a prosecutor is absolutely immune from civil liability for activities which are "intimately associated with the judicial process" such as initiating and pursuing a criminal prosecution, but is not absolutely immune for activities which are administrative or investigative. *Imbler v. Pachtman*, 424 U.S. 409, 430-31 (1976); *Harlow v. Fitzgerald*, 457 U.S. 800, 811 n.16 (1982). Thus, a prosecutor has absolute immunity for controlling the presentation of evidence at trial and participating in a probable cause hearing, but not for providing legal advice to the police. *Burns*, 111 S. Ct. at 1944-45; *Imbler*, 424 U.S. at 430 n.32.

[i]f an attorney is actuated by malicious motives or shares the illegal motives of his client, he may be personally liable with the client for damage suffered by a third person as a result of the attorney's actions.

7 Am. Jur.2d *Attorneys at Law* § 235 at 275 (1980 & 1991 Supp.). *Accord Anderson v. Canaday*, 131 P. 697, 699-700 (Okla. 1913).<sup>3</sup> Our research suggests that only in a narrow class of cases involving defamation claims has the Supreme Court acknowledged a common law tradition of absolute immunity for private lawyers. The Supreme Court recently discussed the concept in further defining the scope of absolute immunity for prosecutors.

Like witnesses, prosecutors and other lawyers were absolutely immune from damages liability at common law for making false or defamatory statements in judicial proceedings (at least so long as the statements were related to the proceeding), and also for eliciting false and defamatory testimony from witnesses. *See, e.g., Yaselli v. Goff*, 12 F.2d 396, 401-402 (CA2 1926), *summarily aff'd*, 275 U.S. 503, 48 S. Ct. 155, 72 L. Ed. 395 (1927); *Youmans v. Smith*, 153 N.Y. 214, 219-220, 47 N.E. 265 (1897); *Griffith v. Slinkard*, 46 Ind. 117, 122, 44 N.E. 1001, 1002 (1896); *Marsh v. Ellsworth*, 50 N.Y. 309, 312-313 (1872); *Jennings v. Paine*, 4 Wis. 358 (1855); *Hoar v. Wood*, 44 Mass. 193, 197-198 (1841). *See also King v. Skinner*, Lofft 55, 56, 98 Eng. Rep. 529, 530 (K.B. 1772), where Lord Mansfield observed that "neither party, witness,

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<sup>3</sup> In Oklahoma,

[a]n attorney is not ordinarily liable for the acts of his client. The fact that through ignorance he gives his client bad advice, on which he acts to the hurt of another, will not make the attorney liable to that other. But where the attorney is actuated by malicious motives or shares the illegal objectives of his client he becomes responsible. *Anderson*, 131 P. at 699-700.

counsel, Jury, or Judge can be put to answer, civilly or criminally, for words spoken in office.”

*Burns*, 111 S. Ct. at 1941. See also *Briscoe*, 460 U.S. at 335 (citing *King v. Skinner*); *Butz v. Economou*, 438 U.S. 478, 512 (1978); *Imbler*, 424 U.S. at 421-24 (discussing *Yaselli* and *Griffith*).

We have reviewed the cases cited by the Supreme Court and must conclude that while absolute immunity might be afforded government lawyers on these claims, such immunity is not available for a private law firm. The cases relied upon by the Supreme Court support absolute immunity (1) for prosecutors on malicious prosecution and defamation claims and (2) for private lawyers on defamation claims.<sup>4</sup>

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<sup>4</sup> *Yaselli v. Goff* held that a prosecutor was entitled to absolute immunity on a malicious prosecution claim by an acquitted defendant. 12 F.2d at 397-398, 402-03. See *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, C.J.) (following *Yaselli* on a false arrest claim against prosecutors and concluding that “it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who do try to do their duty to the constant dread of retaliation”), cert. denied, 339 U.S. 949 (1950). *Youmans v. Smith* was a libel action in which the court recognized a common law privilege associated with a list of pertinent questions prepared by a private lawyer for use in a disbarment proceeding. 153 N.Y. at 215-16, 222. *Griffith v. Slinkard* held that no action will lie against a prosecutor on claims of malicious prosecution and libel by a defendant indicted by a grand jury. 44 N.E. at 1001-02. *Marsh v. Ellsworth* was a libel action against a lawyer who filed an objection to discharge in a bankruptcy action; held, the writing containing the objection is privileged. 50 N.Y. at 309, 313. *Marsh* contains a cogent statement of the rule.

The law is well settled that a counsel for a party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter, hav-

All lawyers are protected by an absolute privilege against defamation actions based upon litigation conduct in judicial proceedings. See 2 F. Harper, F. James & O. Gray, *The Law of Torts* § 5.22 at 191 (1986); 3 *Restatement (Second) of Torts* § 586 at 247-48 (1977); Okla. Stat. Ann. tit. 12, 1443.1 (1980 & 1991 Cum. Supp.); *Kirschstein v. Hayes*, 788 P.2d 941, 947-48, 954 (Okla. 1990) (privilege extends to claims for defamation and intentional infliction of emotional distress). The same rule does not apply to claims for malicious prosecution.

While prosecuting attorneys are subject to an absolute privilege, *Yaselli*, 12 F.2d at 402-03, attorneys employed by private persons usually appear to come under the general principle and they are liable under the same conditions that would subject a layman to liability for encouraging, without probable cause and for an improper purpose, a third person to instigate criminal proceedings against another.

1 F. Harper, F. James & O. Gray, *The Law of Torts*, § 4.3 at 414 (1986); *Restatement (Second) of the Law of Torts* § 653, comment f & illus. 6. Likewise, in prosecuting civil proceedings, if "an attorney acts without probable cause for belief in the possibility that the claim will succeed, and for an improper purpose, . . . he is subject to the same liability as any other person." *Restatement (Second) of the Law of Torts* § 674, comment d; *Reeves v. Agee*, 769 P.2d

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ing no materiality or pertinency to such questions. Id. at 311-12. *Jennings v. Paine* held that a lawyer commenting upon the testimony of a witness while defending his client is not answerable in damages for slander. 4 Wis. at 375. *Hoar v. Wood* was a slander action by a witness in which the court held that words spoken in judicial proceedings by a party or counsel are not actionable if they are pertinent to the subject matter of inquiry. 44 Mass. at 193, 194-95. Finally, *King v. Skinner* involved an indictment against a justice of the peace for allegedly scandalous words spoken to a grand jury; held, the justice of the peace could not be held to answer either civilly or criminally "for words spoken in office." 98 Eng. Rep. at 529-30.

745, 755 (Okla. 1989) ("We know of no rule which gives lawyers absolute immunity for malicious prosecution.") (footnote omitted).

We think that a similar rule applies in this case. While we recognize that prosecutors and government lawyers defending civil actions have been granted absolute immunity on similar claims,<sup>5</sup> the cases do not support an

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<sup>5</sup> Of particular interest in this case is the type of immunity afforded government lawyers in connection with the false or misleading production and presentation of evidence. In *Imbler* the prosecution had absolute immunity on claims that it "had knowingly used false testimony and suppressed material evidence." 424 U.S. at 428-29. The Court strongly rejected the idea that absolute immunity is not available for claims of "willful suppression by a prosecutor of exculpatory information," *Imbler*, 424 U.S. at 431 n.34, and it is "now [a] well-settled rule that a prosecutor cannot be held personally liable for the knowing suppression of exculpatory information." *Auriemma v. Montgomery*, 860 F.2d 273, 279 (7th Cir. 1988), *cert. denied*, 492 U.S. 906 (1989). Whether the claim involves withholding evidence, failing to correct a misconception or instructing a witness to testify evasively, absolute immunity from civil damages is the rule for prosecutors. *See, e.g., Heidelberg v. Hammer*, 577 F.2d 429, 432 (7th Cir. 1978); *Hilliard v. Williams*, 540 F.2d 220, 221 (6th Cir. 1976). Likewise, absolute immunity also extends to allegations that government lawyers misapplied the law in civil and criminal tax matters heard by a tribunal. *Christensen v. Ward*, 916 F.2d 1462, 1474-75 (10th Cir.), *cert. denied*, 111 S. Ct. 559 (1990). In this circuit, absolute immunity has been upheld even given allegations that a prosecutor allegedly lied and filed a false affidavit in the course of a criminal proceedings. *Martinez v. Winner*, 771 F.2d 424, 438-39, *on reh'g*, 778 F.2d 553, 555-56 (10th Cir. 1985), *vacated on other grounds*, 423 U.S. 1066 (1986).

Absolute immunity also has been extended to government lawyers involved in civil proceedings. Analogizing to the functions of a prosecutor, the Court in *Butz*, 438 U.S. at 517 held that "an agency attorney who arranges for the presentation of evidence on the record in the course of an adjudication is absolutely immune from suits based on the introduction of such evidence." In *Barrett v. United States*, 798 F.2d 565 (2d Cir. 1986), the Second Circuit determined that an assistant attorney general defending a wrongful death action was entitled to absolute immunity concerning claims that he concealed facts concerning

analogous common law tradition for private lawyers. Two "client versus counsel" cases suggest that the Supreme Court will not extend absolute immunity without such a tradition. In *Ferri v. Ackerman*, 444 U.S. 193 (1979), the Court ruled that an appointed defense counsel in a federal criminal proceeding, like a private lawyer, does not enjoy absolute immunity from a malpractice action by his former client. *Id.* at 204-05. The Court reasoned that those traditionally afforded immunity are charged with representing the public trust and should not be deterred by civil damage suits. *Id.* at 203-04. In contrast, the appointed defense attorney does not have a duty to the public at large; rather, "[h]is principal responsibility is to serve the undivided interest of his client." Given the rationale of *Ferri v. Ackerman*, the Ninth Circuit overruled its precedent that public defenders are absolutely immune from suit under 1983, and the Supreme Court affirmed. *Glover v. Tower*, 700 F.2d 556, 559 (9th Cir. 1983), *aff'd*, 467 U.S. 914 (1984).

In *Tower*, the Court determined that a public defender did not have absolute immunity against a 1983 claim al-

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federal involvement in the death by way of an experimental drug program. *Id.* at 569-70, 573. The federal attorneys, who did not represent the State and attempted to minimize the exposure of the federal government through concealment, were not entitled to absolute immunity because their activities were too far removed from the judicial process. *Id.* at 573. Similarly, in *Murphy v. Morris*, 849 F.2d 1101 (8th Cir. 1988), an assistant attorney general defending a prisoner civil rights action was entitled to absolute immunity on claims that he introduced improperly obtained impeachment evidence at trial. *Id.* at 1105 ("The introduction of evidence in a judicial proceeding constitutes a normal and regular advocacy function. . ."). Absolute immunity did not attach to the act of obtaining the evidence from the prison mail system, an investigative activity. *Id.* In *Snell v. Tunnell*, we held that preparing and presenting an emergency custody application before a judge constitutes advocacy, notwithstanding the incomplete or false allegations contained therein. 920 F.2d at 694. But the state attorney in *Snell* was denied absolute immunity because she acted beyond colorable authority. *Id.* at 696.

leging a conspiracy to convict a defendant whom the public defender represented. 467 U.S. at 923. Because a public defender was unknown to the common law, the Supreme Court analogized to retained defense counsel. *Id.* at 921. In denying absolute immunity, the Court stated:

"It is true that at common law defense counsel would have benefited from immunity for defamatory statements made in the course of judicial proceedings, . . . but this immunity would not have covered a conspiracy by defense counsel and other state officials to secure the defendant's conviction." *Id.* at 922.

Although the case before us is of the "nonclient versus counsel" variety, *Ferri* and *Tower* suggest that the scope of absolute immunity accorded a private lawyer can be no broader than that originating from common law.

Plaintiffs and G & G seek to hold H & R liable based upon allegedly fraudulent statements in the course of discovery and at trial, but we cannot identify a common law precedent for absolute immunity on such claims.<sup>6</sup> The claims asserted are not for defamation and H & R cannot avail itself of the immunity afforded government lawyers responsible for vindicating the public interest. We must conclude that H & R is not entitled to absolute immunity for the discovery and litigation statements contained in the plaintiffs' second amended complaint.

Next we consider whether we should exercise pendent appellate jurisdiction over otherwise nonappealable issues. H & R urges us to consider whether Fed. R. Civ. P. 60(b) provides the exclusive remedial framework for plaintiffs,

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<sup>6</sup> H & R urges reliance upon the suggestion in *Auriemma v. Montgomery*, 860 F.2d 273, that absolute immunity should extend to "advocates within the broad confines of the civil discovery procedures available in both federal and state courts." *Id.* at 278. We note that the actual holding in *Auriemma* denies absolute immunity to two government defense lawyers based on an extra-judicial investigation. *Id.* Moreover, before policy concerns may be weighed, a common law predicate for absolute immunity must exist. *Tower*, 467 U.S. at 922.

and if so, whether plaintiffs' action is barred under Rule 60(b)(3). See generally 7 J. Moore & J. Lucas, *Moore's Federal Practice* 1 ¶ 260.24[5] (1987 & 1990-91 Cum. Supp.); *In re M/V Peacock*, 809 F.2d 1403 (9th Cir. 1987); *McCarty v. First of Ga. Ins. Co.*, 713 F.2d 609 (10th Cir. 1983); *Villareal v. Brown Express, Inc.*, 529 F.2d 1219 (5th Cir. 1976). H & R also urges us to consider whether Oklahoma would allow plaintiffs' action given the prior and adverse federal court judgment. We recently indicated that three factors inform a decision about pendent appellate jurisdiction:

(1) whether the otherwise nonappealable issue is sufficiently developed, both factually and legally, for our review, . . .

(2) whether review of the appealable issue involves consideration of factors closely related or relevant to the otherwise nonappealable issue, . . . and

(3) whether judicial economy will be better served by resolving the otherwise nonappealable issue, notwithstanding the federal policy against piecemeal appeals. . . .

*Colorado v. Idarado Mining Co.*, 916 F.2d 1486, 1491 (10th Cir. 1990), *cert. denied*, 111 S. Ct. 1584. Our analysis of these factors, if not the layout of H & R's brief-in-chief,<sup>7</sup> convinces us that this is a case of the pendent appellate jurisdiction tail wagging the jurisdictional dog. The three nonappealable issues raised by H & R simply are not integral to the district court's decision to deny absolute immunity. See *Tri-State Generation & Transmission v. Shoshone River Power*, 874 F.2d 1346, 1353 (10th Cir. 1989). Our resolution of the absolute immunity issue without mention of these issues is telling. Moreover, in light of the pending claims and crossclaims, we think that the

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<sup>7</sup> The first 90% of the brief is devoted to otherwise nonappealable issues.

Rule 60(b) issues may become clearer once the operative facts are determined. This will require the district court to carefully assess and characterize the evidence concerning the alleged fraudulent scheme to deprive the plaintiffs of discovery information and damages. Judicial economy will be better served by evaluating these claims on a more complete record, thus avoiding the potential for revisiting the claims in a subsequent appeal. Pendent appellate jurisdiction is a doctrine of discretion, not of right, and in our discretion we decline to consider the nonappealable claims.

The denial of absolute immunity is AFFIRMED. The remainder of the appeal is DISMISSED. All pending motions are DENIED.\*

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\* This denial extends to H & R's request that we award it costs, expenses and attorney's fees if we decline to sanction plaintiffs' counsel for filing a belated 10th Cir. R. 27.2 motion. See Appellant's Motion for Costs and Expenses under 28 U.S.C. § 1927 and the Inherent Powers of the Court at 2.

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF OKLAHOMA

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No. 88-C-367-E and 88-C-1435-E  
Consolidated

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HARRY ROBINSON, et al.

Plaintiffs,

vs.

VOLKSWAGENWERK AG, et al.

Defendants.

*A M E N D E D*  
*O R D E R*

The Order of March 21, 1990 is hereby amended to reflect that Myron Shapiro is not a movant in (1) the motion of Defendants for summary judgment; and (2) the motion of Defendants to dismiss Plaintiffs' Second Amended Complaint. The following order shall be substituted for the March 21, 1990 Order.

The following matters are before the Court:

1. The report and recommendation of the Magistrate entered August 22, 1989 recommending that cases 88-367 and 88-1435 be bifurcated, that the liability issue be tried first and damages reserved for future decision and, that case 88-1435 be dismissed. (docket no. 137).
2. Plaintiff's motion in limine addressing how damages will be proved (docket no. 113).
3. The motion of Greer & Greer for partial summary judgment (docket no. 149).

4. The motion of Defendants Volkswagenwerk AG, Herzfeld and Rubin for summary judgment (docket no. 156).
5. The motion of Volkswagenwerk AG and Defendants Herzfeld and Rubin to dismiss Plaintiffs' Second Amended Complaint (docket no. 159).

The Court has reviewed the arguments, the evidentiary materials submitted and, the applicable authorities. The Court has determined that oral argument would not materially assist the determination of these issues and that these matters can be resolved on the basis of the record before the Court. The pending matters will be addressed in turn.

***1. The August 22, 1989 Report and Recommendation of the Magistrate:***

No objections to the Magistrate's report and recommendation have been filed by any party. The Court has concluded that the Magistrate's report and recommendation should be adopted by the Court.

***2. Plaintiff's Motion in Limine:***

Plaintiffs' motion seeks a ruling determining how damages will be proved. This motion will be held in abeyance pending the determination of liability.

***3. The Motion of Defendants Greer & Greer for Partial Summary Judgment:***

This motion is denied. The original Complaint adequately pled the *Braden* issue. The Second Amended Complaint particularized this matter but did not change the theory. Greer & Greer admits it had actual notice of the theory at the time of the original complaint. It will not, therefore, be prejudiced by the amendment.

**4. *The Motion of Volkswagenwerk AG, Herzfeld and Rubin, for Summary Judgment:***

This motion is denied. The Court finds that disputed issues of material fact exist regarding representations made to Plaintiffs' attorneys in the first lawsuit which led to the dismissal of Volkswagenwerk AG from the first lawsuit. Further, Defendants have not shown that reliance on their alleged misrepresentations was unjustifiable as a matter of law.

**5. *The Motion of Volkswagenwerk AG, Herzfeld and Rubin to Dismiss Plaintiffs' Second Amended Complaint:***

This motion is denied. Defendants argue that the Second Amended Complaint presents an attack on the judgment in the prior litigation and that such claims are barred by res judicata, collateral estoppel and the law of the case. Plaintiffs deny that the Second Amended Complaint attempts to set aside the prior judgment or to relitigate the issues of negligence, products liability and breach of warranty which were resolved against them in the prior litigation. Plaintiffs contend that the Second Amended Complaint merely particularizes their allegations and adds references to evidence revealed in discovery which, Plaintiffs contend, supports their allegations.

This Court already has ruled that the previous products liability action will not be relitigated here. This action concerns only the issue of fraud and other intentional torts. All other claims for relief have been dismissed. By their response to this motion, Plaintiffs concede that this action is so limited. Whatever Plaintiffs' Second Amended Complaint adds to this action, it does not change the claims upon which this action will proceed.

With regard to Defendants' argument that attorneys are absolute immune from liability for their statements made in court proceedings, any immunity that might attach to

a private attorney's conduct does not attach to the conduct alleged in this case to be fraudulent.

In summary the Court orders as follows:

1. The report and recommendation of the Magistrate entered August 22, 1989 is adopted by the Court. Case No. 88-1435 is dismissed on the basis of the oral stipulation of counsel on record August 8, 1989. Greer & Greer will proceed with its allegations of fraud and fraudulent concealment as a cross-claim in case no. 88-C-367-E. This action will be bifurcated; the liability issue will be tried first and the issue of damages is reserved for future decision.
2. Plaintiff's motion in limine addressing how damages would be proved is held in abeyance and will be addressed if and when the damages issue is tried;
3. The motion of Greer & Greer for partial summary judgment is denied;
4. The motion of Volkswagenwerk AG, Herzfeld and Rubin for summary judgment is denied;
5. The motion of Volkswagenwerk AG, Herzfeld and Rubin to dismiss Plaintiffs' Second Amended Complaint is denied.

The hearing on these matters scheduled for April 13, 1990 is stricken.

ORDERED this 24<sup>th</sup> day of April, 1990.

-/S/ JAMES O. ELLISON

UNITED STATES DISTRICT JUDGE

